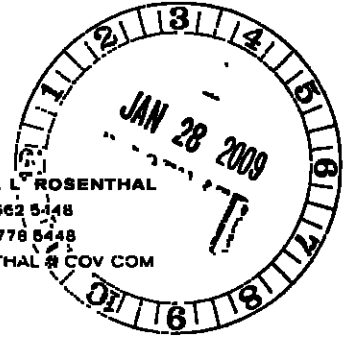


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224427

January 28, 2009

The Honorable Anne K. Quinlan
Acting Secretary
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings
JAN 28 2009
Part of
Public Record

Re: *Ex Parte No 683 – Passenger Rail Investment and Improvement Act of 2008*

Dear Ms Quinlan:

Union Pacific Railroad Company hereby notifies the Board that it intends to participate in the February 11 hearing in the above-referenced matter. Union Pacific requests ten minutes to present its testimony. The testimony will be presented by Jerry S. Wilmoth, Union Pacific's General Manager-Network Infrastructure. An original and ten copies of Mr. Wilmoth's written testimony are enclosed for filing.

Thank you for your assistance.

Sincerely,

Michael L. Rosenthal
Counsel for Union Pacific
Railroad Company

Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 683

PASSENGER RAIL INVESTMENT
AND IMPROVEMENT ACT OF 2008

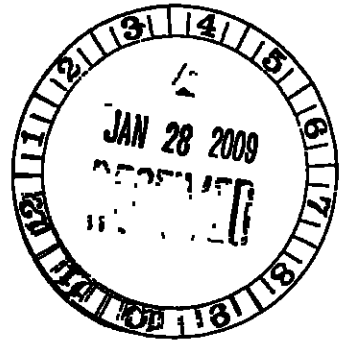
WRITTEN TESTIMONY OF
UNION PACIFIC RAILROAD COMPANY

PRESENTED BY

JERRY S. WILMOTII

GENERAL MANAGER – NETWORK INFRASTRUCTURE

UNION PACIFIC RAILROAD COMPANY



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Date of Submission: January 28, 2009
Date of Public Hearing: February 11, 2009

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Ex Parte No. 683

**PASSENGER RAIL INVESTMENT
AND IMPROVEMENT ACT OF 2008**

WRITTEN TESTIMONY OF UNION PACIFIC RAILROAD COMPANY

My name is Jerry S. Wilmoth. I am General Manager-Network Infrastructure for Union Pacific Railroad Company ("Union Pacific"). As General Manager-Network Infrastructure, my responsibilities include coordinating Union Pacific's relationships with commuter rail providers.

Union Pacific appreciates this opportunity to submit written testimony in response to the Board's Notice of Public Hearing dated December 23, 2008. Union Pacific endorses the views expressed by the Association of American Railroads. Union Pacific offers this testimony to provide additional perspective on the Board's implementation of its new responsibilities with respect to mediating certain access negotiations between commuter rail providers and freight railroads. Union Pacific is submitting this testimony on its own behalf, and it does not reflect input from other railroads. Nevertheless, this testimony reflects our view of issues that apply nationally to all freight railroads and commuter rail providers.

I THE BOARD'S NEW RESPONSIBILITIES REGARDING COMMUTER RAIL

Union Pacific commends the Board for holding a public hearing to solicit advice on how to implement its new responsibilities under the Passenger Rail Investment and Improvement Act of 2008, including in particular the Board's new responsibilities with respect to mediating access negotiations between commuter rail providers and freight railroads.

Freight railroads and commuter railroads both serve vital public interests by providing safe, efficient, environmentally responsible transportation that reduces traffic congestion, avoids expensive highway construction, and lowers harmful greenhouse gas emissions. Union Pacific believes that freight railroads and commuter rail providers can work together to promote these important interests. Union Pacific has a long history of working cooperatively with public transportation authorities to develop successful commuter rail services, and we will continue to consider proposals for new commuter rail services that are viable and adequately funded.

In fact, as some might be surprised to learn, Union Pacific is one of the nation's leading commuter train operators. Our commuter operations for the Chicago Metra system make us the seventh largest commuter train operator in the country, and we have a 98%-plus on-time record. In addition, as host of the Altamont Commuter Express, which operates eight trains a day over our trackage between Stockton and San Jose, and Metrolink, which operates twelve a day over our trackage between Los Angeles and Riverside, and other commuter rail services that share our network, we are responsible for dispatching and maintaining commuter rail lines that serve tens of thousands of passengers each day. We also host Amtrak's high-density operation of the Capitol Corridor between the Sacramento area and San Jose, where Amtrak runs 32 trains per day, with an on-time record that typically exceeds 95%. In fact, passenger satisfaction and on-time performance on this route are higher than on Amtrak's Northeast Corridor and on any other intercity passenger route in the United States.

The Passenger Rail Investment and Improvement Act creates a new role for the Board in situations where public transportation authorities are negotiating to use trackage or rights-of-way of freight railroads in order to provide commuter rail service. The Act allows either party to ask the Board to conduct a nonbinding mediation if the parties have been unable to reach agreement

after a reasonable period of negotiation. The Act requires the Board to conduct the mediation in accordance with the principles under which the agency mediates rate cases, but it recognizes that the Board may need to promulgate rules and regulations to address the particular circumstances presented in access negotiations involving commuter rail service.

Union Pacific believes that Board mediation can play a constructive role in facilitating agreements between public transportation authorities and freight railroads. A knowledgeable mediator can facilitate agreements by, among other things, helping to ensure that each party understands the other party's position, encouraging each party to adopt realistic expectations, keeping open the channels of communication, and suggesting win-win solutions that parties might not otherwise recognize.

Union Pacific does not expect that Board mediation will be necessary in most situations involving requests for access to our tracks or other facilities. We make every effort to explain to interested parties the basic principles we apply when evaluating commuter rail service proposals and negotiating access agreements: ensuring safety in passenger and freight operations, ensuring reliable service for our existing customers and the ability to provide service to new customers; ensuring that capacity remains available to accommodate future freight traffic growth, and ensuring that we are appropriately compensated for the use of our assets and do not incur any exposure to liability that would not exist absent commuter operations.

Union Pacific recognizes, however, that the opportunity to mediate, and thus to benefit from a mediator's neutral perspective, industry knowledge, and skills in facilitating agreements, can be important in the event that private negotiations break down. Mediation will not guarantee that parties will successfully conclude agreements. Union Pacific's interest in using its facilities to provide safe, efficient, and reliable service to existing and future freight customers simply will

not always be compatible with a public transportation authority's interest in using those facilities to provide safe, efficient, and reliable passenger service (for example, where there is no room to expand freight rail capacity for passenger trains), or the available public funding may not be sufficient to compensate and indemnify us or to finance needed capacity improvements. We believe, however, that Board-sponsored mediation has the potential to help freight railroads and public transportation authorities better communicate their interests and constraints and help the parties work through roadblocks and towards mutually beneficial outcomes.

II. BALANCING THE DESIRE FOR ADDITIONAL COMMUTER RAIL SERVICE WITH PROTECTING THE CRITICAL ROLE PLAYED BY FREIGHT RAILROADS

As the Board undertakes its new mediation responsibilities, it should recognize that appeals to respond to the public's interest in additional commuter rail service must be balanced against the need to protect the equally critical benefits that freight railroads provide by carrying traffic that otherwise would likely cause more congestion on the highway network.

In fact, freight rail provides the public with at least as many benefits as commuter rail provides. Freight rail and commuter rail are fuel efficient, environmentally sound modes of transportation. If just 10% of freight that moves by highway today moved by rail instead, our nation's annual fuel savings would exceed one billion gallons. In addition, due to railroads' fuel efficiency, freight that moves by rail instead of truck reduces greenhouse gas emissions by two-thirds or more per ton mile. Freight rail and commuter rail also help reduce highway gridlock. A typical freight train takes the equivalent of several hundred trucks off our highways, which reduces the cost of maintaining existing roads and the pressures to build costly new roads.

When public transportation authorities seek access to our trackage or other facilities to develop new commuter rail service, we strive to achieve a balance that accommodates the new passenger service while protecting our ability to provide the benefits of freight rail service, now

and over the long term. Our negotiations typically focus on several issues that are critical in achieving the necessary balance. protecting our existing and future capacity to provide freight rail service, ensuring the reliability of our service, and conducting safe operations that protect the public and minimize our exposure to liability

A. Protecting Existing and Future Capacity to Provide Freight Rail Service

Perhaps the most critical issue facing freight railroads today is the need to maintain and expand our present capacity to serve existing and future freight customers. Although freight volumes have dropped as a result of the current economic environment, all recent studies agree that the nation is facing a transportation infrastructure crisis and that rail freight capacity is a precious resource that must be preserved and expanded in order to meet the nation's present and future transportation needs. Union Pacific has experienced first-hand the problems that can result from rail congestion and has learned from that experience. We have been investing heavily in our network (our investments grew by 48% from 2003 to 2008) in order to maintain and improve service to existing customers and to provide new service to businesses that are increasingly turning to rail service as highway congestion has increased and the demand for transportation has grown.

Union Pacific's acute sensitivity to the need to protect and expand our capacity to handle freight rail traffic directly affects our responses to access requests from commuter rail providers. Under ideal circumstances, freight rail and commuter rail operations would never share the same tracks: passenger operations should be physically separated from freight operations whenever possible to protect passenger safety, as well as the safety of our operations, our employees, and the communities in which we operate, and to allow each carrier to conduct its operations using its own capacity. Separate operations also provide freight railroads and passenger railroads the maximum flexibility to adjust their operations in response to customer needs without interfering

with each other. Our recent experience reinforces this view. In particular, light-rail equipment – which does not satisfy FRA safety standards for operation on main line railroads – should not be allowed to operate on or in close proximity to freight railroads.

Our views toward separation of freight and commuter rail operations are in complete accord with those expressed in the Onetrail Coalition's Statement of Principles that "public policy should envision separate rights of way for freight and passenger operations where separation is warranted." In many cases, however, there will be no alternative to joint operations. Freight railroads will have to share their tracks if there is to be commuter service.

In the past, Union Pacific and its predecessor railroads entered into agreements with commuter rail providers that did not reflect a concern for preserving or expanding freight rail capacity. For example, Southern Pacific sold its San Jose to San Francisco line to the Peninsula Corridor Joint Powers Board (Caltrain) and retained only limited rights to continue to conduct freight operations. Caltrain currently operates 98 trains per day over that line, and as commuter operations grow, our freight operations are being compressed toward the contractual minimum of a five-hour nighttime window, which could restrict our ability to support growth of the Port of San Francisco. This and other similar agreements were made at a time when freight railroads had significant excess capacity: they were shrinking and struggling to survive. Today, Union Pacific is clearly focused on balancing the surging public interest in additional commuter service with our ongoing responsibilities to our customers and the critical role that freight railroads are playing today, and will increasingly play in the future, in carrying freight that otherwise would likely compete for space on the highway network.

Commuter rail providers that seek to provide new service on Union Pacific's lines must recognize our responsibility to protect our present and future ability to serve freight customers.

They should not expect Union Pacific to redirect its freight capacity to passenger service. They must be prepared to fund all capacity needed to accommodate passenger operations, which means not only providing for their own immediate needs, but also preserving our existing opportunities to expand freight operations as demand grows.

It is easy to overlook an important aspect of investing in new capacity for commuter rail, and Union Pacific has overlooked it to the detriment of freight service in the past. When adding capacity to a railroad line, one naturally adds the least expensive capacity first and defers as long as possible the more expensive components, such as expanded bridges and tunnels. Commuter rail providers should take this factor into account when they fund new capacity: they should be prepared to offset the higher costs that freight railroads would face in adding later capacity to accommodate growing freight traffic.

Union Pacific has varied agreements with commuter rail providers that reflect many of these principles. Our agreement with the Altamont Commuter Express, for example, includes provisions requiring the commuter railroad to pay for the added capacity needed to handle commuter trains on our lines, as well as an annual capital access fee designed to compensate us for the use of our facilities, a maintenance and operating fee designed to compensate us for the day-to-day work we perform to support commuter rail operations, and contributions to a capital pool that is used to reinvest in the line – for example, to upgrade track, signals and bridges. Union Pacific intends to be even more forward-looking in future agreements, especially in ensuring that opportunities to expand our capacity and serve new customers are preserved. As the Board exercises its mediation role, it needs to be as fully concerned with the future of freight rail's benefits and capacity as it is with adding more commuter services. Union Pacific has shown that this balance can be struck.

Union Pacific recognizes that every situation is different, and we do not take a cookie-cutter approach to commuter rail access requests. Where we have lines with substantial excess capacity and there is little or no prospect of expanding freight traffic to use that capacity, we might not request the same level of capacity funding from commuter rail providers that we might request in different circumstances. Nonetheless, the Board and commuter rail providers should understand that capacity issues will necessarily play a significant role in future commuter rail access negotiations.

B. Ensuring the Reliability of Freight Rail Service

Union Pacific cannot fulfill its responsibilities to existing and future customers or contribute to solving the nation's transportation crisis unless our rail service is not only safe, efficient, and environmentally responsible, but also reliable. Likewise, commuter railroads cannot fulfill their own potential to reduce congestion and lower greenhouse gas emissions unless they can promise their passengers reliable service.

Operations in which freight railroads share trackage with commuter railroads present special challenges to service reliability. Union Pacific is sensitive to these challenges when it addresses access requests from commuter rail providers, and commuter rail providers must be equally sensitive to these issues when they propose service plans and infrastructure investments for joint operations. Commuter rail providers' plans should recognize that freight trains operate at all hours of the day, every day of the week, and every week of the year, and they should not expect freight railroads to agree to service restrictions that would negatively impact freight service reliability, such as halting freight operations for several hours every morning and evening during rush hour. (For example, Union Pacific and Chicago Metra are currently developing joint plans to eliminate curfews and increase capacity on the busy UP line west from Chicago through Geneva, Illinois.) Freight railroads require regular inspections, maintenance, and replacements

to ensure reliable service, and commuter rail providers' plans should be flexible enough to accommodate our inspection, maintenance, and replacement needs – especially if we are to provide the highly reliable service and ride quality that passengers expect.

Union Pacific also recognizes that reliability is a two-way street. When a commuter rail provider establishes a feasible service plan and provides assets and personnel sufficient to carry out that plan, we have an obligation to implement the plan by dispatching and maintaining our lines in an efficient manner. We therefore expect that agreements with commuter rail providers will include standards for measuring reliability and that such standards will play an important role in future commuter rail access negotiations.

C. Safety and Liability

As in all of Union Pacific's endeavors, safety must come first when we are developing access agreements with commuter rail providers. Our concern for safety is one of the primary reasons we believe that passenger operations and freight operations should operate in separate right-of-ways whenever feasible. When separation of operations is not feasible, Union Pacific expects that commuter rail providers will fund or locate the funding to cover the safety-related costs attributable to their operations. These safety costs would include, among other things, an appropriate share of the cost of complying with federal requirements that trains and tracks be equipped with Positive Train Control ("PTC") wherever passenger trains operate. They would also include the costs associated with necessary improvements to grade crossing warning signals, any new grade separations, and any required fencing.

In addition, Union Pacific should not be expected to incur any additional exposure to liability associated with allowing passenger service on our lines. We should not be left exposed to new liability because of our voluntary agreement to accommodate access requests by commuter rail providers, an accommodation that does not benefit Union Pacific but contributes heavily to

the public interest. Commuter rail providers that seek access agreements with Union Pacific should be prepared to obtain and provide evidence of insurance up to the limit of liability under federal law, and they should be prepared to indemnify us against liabilities arising in connection with their commuter rail access to our facilities. Indeed, the Passenger Rail Investment and Improvement Act recognizes that this issue can properly be treated as non-negotiable.

III. SPECIFIC SUGGESTIONS FOR NEW REGULATIONS REGARDING MEDIATION

The Passenger Rail Investment and Improvement Act instructs the Board to conduct commuter rail access mediations in accordance with the process used to mediate rail rate cases. Union Pacific believes that no significant adjustments to the Board's rate case mediation process are necessary to adapt it to the context of commuter rail access mediations.

Union Pacific has participated in several rate case mediations, and our experience has been very positive, even in cases in which a mediated result could not be achieved. The Board's rate case mediation process contains important features that contribute to positive outcomes, and those features should be replicated in any new rules and regulations regarding commuter rail access mediations. The key features are:

- The mediator should be drawn from the agency's staff;
- The mediator should have the flexibility to approach each mediation on a case-by-case basis and structure mediations to maximize the prospects of reaching agreement while minimizing burdens on the parties;
- The mediation should have specified time limits; and
- The entire mediation process should be private and confidential, and no information disclosed in the mediation process should be disclosed by the mediator or the parties in any other forum, including to the Board;

We briefly discuss each of these features below.

A The Mediator Should Be Drawn From Agency Staff

Union Pacific believes that commuter rail access mediations will have the best prospect for a successful outcome if the mediator is already knowledgeable about the operating, financial, and other issues facing both freight railroads and public transportation authorities when they are attempting to negotiate access agreements. Although it might be possible to identify mediators who would meet these criteria and who are not on the Board's staff, there are important benefits to be gained by building a core of expertise within the agency, so that mediations are conducted by individuals who have experience in dealing with the parties and the issues that typically arise in commuter rail access negotiations. We encourage the Board to ensure that one or more of its staff members receives detailed training on commuter rail issues and the interface with freight operations, and we would be pleased to participate in that training. Trained, experienced mediators will be able to draw on their past experiences and industry knowledge to develop creative solutions and promote successful outcomes, and they will be able to conduct mediations more efficiently.

B. The Mediator Should Have Flexibility in Structuring the Mediation Process

In Union Pacific's experience, the mediation process is most productive and efficient when the mediator is given the flexibility to structure the mediation process based on his or her ongoing evaluation of the situation. Regulations that require parties to participate in a specified number of mediation sessions on a specified schedule will have a tendency to result in a process in which parties simply go through the motions in order to comply with the rules. In addition, rules that require parties to follow a pre-determined process may result in wasted resources – for example, a phone call or multiple phone calls may be able to produce the same result as cross-country travel for a face-to-face session. An experienced mediator, working in consultation with

the parties. is in the best position to determine how each mediation should be structured to maximize opportunities to reach agreement while minimizing the burdens on the parties.

C The Mediation Should Have Specified Time Limits

Although Union Pacific believes that the mediator should have flexibility in structuring the mediation process, we also believe that there must be some fixed limits to the mediation. If there is no ultimate deadline, parties may not have a sufficient incentive to devote the time and resources necessary to complete the mediation process. The existence of a process without any firm concluding date also places burdens on the mediator, who must continue to manage the mediation. The Board's mediation rules for rate cases provide for a 60-day mediation period and the possibility of an extension. A similar approach would be appropriate in commuter rail access mediations.

D The Mediation Process Should Remain Private and Confidential

An essential feature of any successful mediation process is that the entire mediation process, including any information communicated among the parties and the mediator, must remain entirely private and confidential. The Board's mediation rules for rate cases expressly provide that the entire mediation process shall be private and confidential and that information disclosed during the mediation process may not be disclosed by the parties or the mediator to the Board or in any other forum. Such a confidentiality rule is essential. The parties cannot honestly reveal their positions to the mediator or discuss potential concessions with each other unless they can be confident that the information will never be disclosed outside the mediation. A mediation cannot be successful if parties cannot engage in honest and open discussions with the mediator and each other.

IV CONCLUSION

Union Pacific appreciates the opportunity to testify in this proceeding. Freight railroads and commuter railroads produce the same types of important public benefits by reducing traffic congestion on our nation's highways and meeting our nation's growing transportation demands in an environmentally responsible manner. We believe that freight railroads and commuter rail providers can work together to increase commuter rail service while remaining sensitive to the needs of freight railroads to protect their capacity and service quality and to provide safe and efficient service to their existing and future customers.

We look forward to the opportunity to participate in any future proceedings to address specific rules or regulations that the Board proposes to adopt for mediating access negotiations between freight railroads and commuter rail providers.